Cloverland Farms Dairy t/a Royal Farms,

Petitioner

Before The Zoning Board of

Howard County, Maryland

ZB Case. 1074M

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DECISION AND ORDER

On March 25, April 1, and April 15, 2009, the Zoning Board of Howard County, Maryland considered the petition of Cloverland Farms Dairy trading as Royal Farms for an amendment to the Zoning Map of Howard County, Maryland to reclassify 1.31 acres of land from the B-1 (Business: Local) to the B-2 (Business: General) Zoning District, with Site Plan Documentation for a Gasoline Service Station use, to add fuel dispensers to an existing convenience store facility. The subject property is located on the northeast corner of the Lark Brown Road intersection with MD 108, and is identified as Tax Map 37, Grid 20, Parcel 604, Parcel B; 8268 Lark Brown Road.

The notice of the hearings was advertised, the subject property was posted, and adjoining property owners were mailed notice of the hearing, as evidenced by the certificates of posting, advertising and mailing to adjoining property owners, all of which were made part of the record. Pursuant to the Zoning Board's Rules of Procedure, all of the reports and official documents pertaining to the petition, including the petition, the Technical Staff Report of the Department of Planning and Zoning, and the Planning Board's recommendation, were made part of the record. The Department of Planning and Zoning recommended approval of the petition with several conditions. The Planning Board was unable to achieve a majority vote to either recommend approval or denial of the petition, deadlocking 2-2.

The Petitioner was represented by Thomas Meachum, Esq., Carney, Kelehan, Bresler, Bennett & Scherr, LLP. Several other residents and organizations, representing themselves, appeared in opposition to the petition. The Zoning Counsel, Eileen Powers, Esq., appeared to support the comprehensive zoning of the subject property as provided by law.

After careful evaluation of all the information presented, the Zoning Board of Howard County, Maryland makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This case involves a proposed rezoning of the 1.31 acre B-1-zoned subject property to the B-2 Zoning District with a documented site plan for a Gasoline Service Station use to add fuel dispensers to an already existing convenience store facility.

While there was extensive testimony on many issues potentially material to this case, including the proposed documented site plan, the need for a gasoline service station in the area, and the traffic impacts of a proposed gas station use on area roads, none of these issues become pertinent unless and until the Zoning Board would initially find that there is a basis for granting rezoning, based either on evidence of substantial change in the character of the neighborhood of the subject property or mistake in the comprehensive zoning of the subject property. In addition, the Petitioner indicated that it was relying only on alleged substantial change in the character of the neighborhood as a basis for rezoning in this case.

Because the Zoning Board has determined that Petitioner did not meet its burden of proof on the threshold issue of whether there was substantial evidence of change in the character of the neighborhood of the subject property since the last comprehensive zoning to justify the granting of rezoning, the Board will only make findings of fact and conclusions of law on this threshold issue in this decision and order.

2. The Petitioner, through its planning witness, Ms. Melanie Moser, defined the neighborhood of the subject property as Route 175 to the south, Interstate 95 to the southeast, Deep Run Parkway up to the Waterloo Road MD 108 intersection to the north and MD 108 to the west. This proposed neighborhood is slightly smaller than the neighborhood proposed by the Petitioner prior to the Zoning Board stage of the proceedings, and differed from the neighborhood proposed by the Department of Planning and Zoning in its Technical Staff Report. DPZ's proposed neighborhood was less extensive than Petitioner's on the east side of MD 108 but also extended west of MD 108, which Petitioner's did not. DPZ's proposed neighborhood is basically bisected by MD 108, with MD 175 as its southern boundary, as shown on page 4 of DPZ's Technical Staff Report.

The Board accepts DPZ's proposed neighborhood as the appropriate neighborhood for the subject property for purposes of determining any alleged changes within that neighborhood. The definition of the neighborhood is not crucial or determinative in this case, since the pertinent change as alleged by the Petitioner was the development of the NT-zoned Benson East development located in the southeast quadrant of the MD 108 and Lark Brown intersection, and this predominantly retail commercial development, otherwise known as Gateway Overlook, is located in both DPZ's and Petitioner's proposed neighborhood of the subject property.

3. The Petitioner presented evidence through several of its witnesses that the development of Gateway Overlook since the passage of Council Bill 75-2003 on February 2, 2004 (2004 Comprehensive Zoning), effective April 13, 2004 (Zoning Counsel Exhibit 1), constituted a change in the character of the neighborhood since the last comprehensive zoning justifying the requested rezoning from B-1 to B-2.

Mr. Jeffrey Bainbridge, Director of Real Estate for Cloverland Farms, testified that the convenience store on the subject property was redeveloped in 2002-2003, adding additional property, and enlarging the convenience store and parking areas. Mr. Bainbridge indicated that when these improvements were made, the Gateway Overlook development had not started. Mr. Bainbridge acknowledged that Cloverland Farms anticipated requesting approval of gas pumps when it expanded the building and the parking in 2002-2003, but that they had simply "missed" requesting B-2 zoning during the 2003-2004 Comprehensive Zoning process.

4. Ms. Melanie Moser, a registered landscape architect and practicing land planner, testified as to the neighborhood of the subject property, as previously indicated, and the alleged changes occurring in that neighborhood due to the development of Gateway Overlook. Ms. Moser indicated that aerial photos of the area (Petitioner's Exhibits 4 and 5) show the Gateway Overlook property to be wooded in 2004, at the time of the 2004 Comprehensive Zoning, and largely developed in 2007. Ms. Moser indicated that the "small retail" neighborhood was changed to a more B-2 area by the development of the approximately 120 acre Gateway Overlook property as a "Big Box" regional retail center. Ms. Moser indicated that the mass grading of the Gateway Overlook site changed its character.

Ms. Moser indicated that although the zoning of the Gateway Overlook property was New Town, she believed the equivalent non-New Town zoning of the property would be B-2. Ms. Moser did not believe the retail uses of the Gateway Overlook property were contemplated changes because the "Employment-Commercial" designation known at that time could have contemplated either office uses or the B-2 retail uses that eventually pre-dominated on the site. Ms. Moser also expressed the opinion that the "extremely rapid" pace of development on the Gateway Overlook site, compared to the development of other New Town properties in the past,

also constituted change in the character of the neighborhood. Ms. Moser did not disagree that the development of an office park on the Gateway Overlook property could have justified B-2 rezoning of the subject property as well as retail development but thought the speed of the retail development which has occurred was a factor in the change, not just whether it was retail or office development.

Ms. Moser acknowledged that the New Town PDP had designated the area of the Gateway Overlook property for Employment-Commercial for many years before the 2004 Comprehensive Zoning but that even when the Comprehensive Sketch Plan was presented for approval at the time of the 2004 Comprehensive Zoning, only bulk parcels and roads were shown and specific permitted uses were not.

Ms. Moser also acknowledged that it was likely that the County Council did not want the subject property to be zoned B-2 at the time of the 2004 Comprehensive Zoning, and that this was a reasonable decision, but she countered that the Gateway Overlook property's development changed that. Ms. Moser also did not agree that the B-1 zoning of the subject property was a needed buffer between the Gateway Overlook property and other properties.

5. Mr. Steve Johns testified as a witness for the opposition to the proposed rezoning. Mr. Johns indicated that he worked for DPZ as a planner during the Comprehensive Zoning process in 2002-2004. Mr. Johns indicated that this process was advertised in newspapers and that DPZ communicated with various attorneys regarding rezoning requests in this process. He stated that there were over 100 applications filed for rezoning during this process, and that this process was the time to come in to request changes in zoning based on change.

Mr. Johns reiterated that the PDP for the New Town District showed the area of the Gateway Overlook property to be an Employment Center-Commercial area, and that a

commercial undertaking pursuant to that designation was an anticipated change, the kind of development that people could have expected in an Employment Center-Commercial area. Mr. Johns also indicated that the mere location of the Gateway Overlook property between I-95, MD 175 and MD 108 would indicate that the development would be a "high intensity" use. He also noted that New Town development typically segregated its commercial uses from local uses through buffering and location of uses off of major roads. Mr. Johns also testified that any grading done as part of development is just as anticipated as the development itself.

6. Mr. Edward Ely also testified for the opposition to the proposed rezoning. Mr. Ely worked in a senior position with the Rouse Company from 1982 through 2005 in commercial land sales and was specifically involved with the development of Gateway Overlook up until March, 2005.

Mr. Ely testified that the Gateway Overlook property, known as Benson East at the time, was always shown on the PDP as Employment Center-Commercial, and that this designation always contemplated the uses that were eventually developed there. Mr. Ely indicated that this property was the last property to develop, and that it is common in real estate to save the "best" land for last. He also indicated that DPZ always knew that there would be "intense" development on the Gateway Overlook property. He noted that the Planning Board rejected a gas station use on the Gateway Overlook property originally, and later approved a "members-only" Costco station on the site because it was internal to the site.

Mr. Ely testified that the FDP for Benson East was approved on St. Patrick's Day (March 17), 2004, and that the Gateway Overlook property could have been developed with any combination of what's there today (retail), condo offices or high-rise offices based on that approved FDP. He indicated that it was always contemplated that the Gateway Overlook

property would be developed with offices and/or retail. Mr. Ely indicated that, to date, about 500,000 square feet of retail had been developed on the Gateway Overlook property, which is very close to the assumption of 440,000 square feet of retail development made by the traffic consultant at the time of the approval of the FDP for Benson East (Zoning Counsel Exhibit 1).

- 7. The Zoning Counsel, Eileen Powers, Esq., introduced into the record a number of official County documents relating to the petition, all as part of Zoning Counsel's Exhibit 1, including HRD's original 10/9/02 application in PB Case 360 for the Comprehensive Sketch Plan (CSP) approval for Benson East, DPZ's Technical Staff Report for PB 360, the Planning Board's minutes for March 17, 2004, which included the consideration of PB 360, and the recorded Final Development Plan (FDP) for Benson East, Phase 240, dated June 3, 2005 (Petitioner's Exhibit 6, was the recorded amended FDP for Phase 240-A-I).
- 8. As indicated in Finding of Fact 2 above, the Board finds that the neighborhood of the subject property is the neighborhood as defined by DPZ in its Technical Staff Report. This neighborhood, as is the case for Petitioner's proposed neighborhood, includes the Gateway Overlook development within its boundaries. The development of Gateway Overlook from raw land to a fully developed retail commercial area over the last 5 years is unquestionably a change. The only question is whether this change is one that was contemplated or not at the time of the adoption of the 2004 Comprehensive Zoning. Based on the findings made below, the Board finds that the development of Gateway Overlook was commercial development which was contemplated at the time of or prior to the adoption of the 2004 Comprehensive Zoning, and therefore is not evidence of a substantial change in conditions affecting the neighborhood of the subject property since the last comprehensive zoning.

9. It is undisputed that the Preliminary Development Plan for the New Town Zoning District has designated the Gateway Overlook property as "Employment Commercial" for about 40 years. A combination of office and/or retail uses was therefore contemplated, in terms of the PDP, at the time of the 2004 Comprehensive Zoning and for many years prior to that.

In October of 2002, Howard Research and Development Corporation initiated the final stage of the New Town development process for the Gateway Overlook property by filing the Comprehensive Sketch Plan for what was then known as the Benson East property in Planning Board Case 360. By this petition, HRD sought to fix the actual uses to be permitted on the subject property for Phase 240 of the Final Development Plan consistent with the PDP "Employment-Commercial" designation. HRD proposed that for "Employment Center Land Use- Commercial" areas on FDP 240 that the permitted uses include "all uses permitted in POR, B-1, B-2 and SC districts. . ." and specified other uses to be permitted, including a gasoline service station use. These steps were taken undertaken pursuant to Section 125C. of the Howard County Zoning Regulations pertaining to the New Town development process.

DPZ issued its Technical Staff Report for the Planning Board hearing on FDP Phase 240 in Planning Board Case 360 on March 17, 2004, recommending approval of the petition. In this Technical Staff Report (p.5), DPZ indicated that the Subdivision Review Committee completed its review of the proposed Comprehensive Sketch Plan for Benson East on February 3, 2004. DPZ noted (on p. 3 of the TSR) that the purpose of the Comprehensive Sketch Plan and Final Development Plan Criteria was "to establish the permitted uses of land for this site (Benson East)." DPZ noted that "the developer has submitted proposed criteria that are consistent with the adopted Master Comprehensive Final Development Plan Criteria for the New Town District."

DPZ advised that the proposed "Employment Center Commercial. . . land uses are consistent with the PDP."

The Planning Board considered FDP 240 on March 17, 2004 at a public hearing. The Planning Board's minutes indicate that the possible Employment Center Commercial uses proposed for FDP 240 included the aforementioned B-1 and B-2 uses, among others. The Planning Board's minutes also reflect that HRD indicated that the uses upon which the traffic study was based for the proposed subdivision plans accompanying FDP 240, included an assumption of 440,000 square feet of retail, 316,000 square feet of office space and 100 apartments. The Planning Board's Decision and Order in Planning Board 360, which was issued on April 14, 2004, approximately 30 days after its vote on March 17, 2004, approved the Comprehensive Sketch Plan, including the FDP Criteria for FDP Phase 240, in Planning Board Case 360. As part of its decision, the Planning Board specified that "gas station shall be removed from the text criteria for FDP Phase 240, as a permitted use for the Employment Center Commercial Land Use areas."

The actual FDP for Phase 240, specifying the permitted uses for Benson East, including its Employment Center Commercial Land Use areas, was not recorded until June, 2005.

The 2004 Comprehensive Zoning of Howard County was implemented by the County Council's adoption of Council Bill 75-2003 on February 2, 2004, effective April 13, 2004.

10. The Board finds that the Petitioner has not established sufficient evidence of change in the character of the neighborhood of the subject property, as defined by DPZ in its Technical Staff Report, to justify the requested rezoning, and it makes the following findings as to this issue:

- a. It is clear from the record that the Preliminary Development Plan (PDP) for the area that is now Gateway Overlook has designated that area as Employment Commercial for a number of years preceding the 2004 Comprehensive Zoning, and that such a designation contemplated a combination of office and/or retail uses;
- b. HRD, as the owner and developer of the Gateway Overlook property, proposed as early as 2002 that the PDP be implemented through the New Town CSP/FDP approval process, to allow Employment Center-Commercial Land Uses on portions of Benson East (Gateway Overlook), including uses permitted in the POR, B-1, B-2 and SC Districts, uses that are consistent with the Master Comprehensive Final Development Plan Criteria for the New Town District;
- c. DPZ recommended approval of these proposed Employment Center-Commercial uses for the Benson East (Gateway Overlook) property as being consistent with the property's PDP Employment Center Commercial designation during the period of February/March 2004, at the time of the County Council's adoption of the 2004 Comprehensive Zoning, and prior to the effective date of the 2004 Comprehensive Zoning;
- d. The Planning Board approved the proposed Employment Center Commercial uses and found them to be consistent with the property's PDP Employment Center Commercial designation prior to the effective date of the 2004 Comprehensive Zoning;
- e. HRD provided traffic study information to the Planning Board at its March 17, 2004 hearing on the proposed CSP/FDP Criteria defining the permitted uses for Benson East, which indicated that 440,000 square feet of retail space was contemplated to be developed on the Benson East (Gateway Overlook) property;

- f. All of the above information indicates that Employment Center Commercial uses, including some mix of office and/or retail have been contemplated for the Gateway Overlook property since the adoption of the PDP, which occurred long before the 2004 Comprehensive Zoning, approximately 40 years ago, and that uses permitted in the POR, B-1, B-2 and SC Districts, standard uses for Employment Center Commercial land uses areas according to the Master Comprehensive Final Development Plan Criteria for the New Town District, have been contemplated for the Gateway Overlook property, at the latest since the proposal of such uses for approval on the CSP/FDP by the developer in 2002 and since DPZ's recommendation of approval of such uses, and the Planning Board's approval of such uses, at the time of the 2004 Comprehensive Zoning;
- g. The actual physical development of the Gateway Overlook property, including its grading and physical construction of the large commercial retail center on it, are changes that were contemplated by the property's PDP Employment Center Commercial designation, and the CSP/FDP Criteria approvals required to be consistent with the PDP designation, both of which occurred and were known prior to the effective date of the 2004 Comprehensive Zoning;
- h. While the actual uses that were developed on Gateway Overlook after the 2004 Comprehensive Zoning could not have been precisely contemplated parcel by parcel or land area by land area, all of the uses that were eventually developed on the Gateway Overlook property were contemplated by the approved PDP and the FDP, which was required to be consistent with the PDP, prior to or at the time of the 2004 Comprehensive Zoning; and
- i. The rapid pace of development does not constitute evidence of change in the character of the neighborhood, if that development was contemplated at the time of or prior to the 2004 Comprehensive Zoning.

CONCLUSIONS OF LAW

- 1. The Petitioner, as one seeking a piecemeal zoning reclassification, has the burden of demonstrating substantial change in the character of the neighborhood or a basic and actual mistake in the comprehensive zoning of the subject property. If this burden is not met, the Zoning Board is not permitted to grant rezoning.
- 2. In this case Petitioner relies on alleged changes in conditions affecting the character of the neighborhood since the last comprehensive zoning, the 2004 Comprehensive Zoning adopted effective April 13, 2004, as its basis for justifying the requested rezoning.
- 3. In presenting a case for piecemeal rezoning based on change in the character of the neighborhood since the last comprehensive zoning, a petitioner bears the burden of defining the neighborhood of the subject property within which alleged changes since the last comprehensive zoning have occurred, and establishing those post-comprehensive zoning changes in conditions which have changed the character of the defined neighborhood.
- 4. While the Zoning Board opted to accept DPZ's proposed definition of the neighborhood of the subject property rather than Petitioner's, as noted in Findings of Fact 2 and 8, there is no practical difference between the two neighborhoods in terms of considering the alleged changes within it since the only changes are tied to the Gateway Overlook property's development, and that development is located in both DPZ's and Petitioner's proposed neighborhood.
- 5. The principal issue in this case is whether the development of Gateway Overlook as a large retail commercial shopping center in the neighborhood of the subject property, including the grading and construction which has occurred in that development process, all after the 2004 Comprehensive Zoning, is development that was contemplated at the time of or prior to the

2004 Comprehensive Zoning. It is well-established in Maryland case law that development contemplated at the time of the adoption of the last comprehensive zoning, even if it occurs after it, standing alone may not be taken as a change in conditions affecting the neighborhood. If the Gateway Overlook development is determined to be development contemplated for that property at the time of or prior to the 2004 Comprehensive Zoning, it cannot serve as a basis for establishing change in the character of the neighborhood in this case, even under the more liberal standard accorded proposed reclassifications from one commercial subcategory to another.

- 6. Based on the Board's findings of fact, the Board concludes that the Gateway Overlook development was contemplated at the time of or prior to the adoption of the 2004 Comprehensive Plan, and therefore does not constitute evidence of change in the character of the neighborhood since the last comprehensive zoning that would justify the requested rezoning.
- 7. The Petitioner's case for the proposed rezoning was based on alleged change in the character of the neighborhood, and that case for that alleged change was based on the development of the Gateway Overlook property in the neighborhood of the subject property. The Board has concluded that the changes which eventually occurred due to this development were in fact changes which were contemplated at the time of or prior to the 2004 Comprehensive Zoning, and therefore could not be considered as evidence of such a change in conditions. Therefore, the evidence which the Petitioner has presented to show changes in conditions affecting the character of the neighborhood since the last comprehensive zoning is not sufficient to overcome the strong presumption of correctness attached to comprehensive zoning so as to justify rezoning. Having concluded that Petitioner has failed to meet its onerous burden of proving strong evidence of such substantial changes in conditions affecting the character of the neighborhood of

the subject property since the last comprehensive zoning, the Board concludes that it is not permitted to grant the requested rezoning.

8. Because the Board has concluded that sufficient evidence was not produced to justify the requested rezoning, it cannot consider any remaining issues in this case, including whether B-2 Zoning is appropriate for the subject property and/or whether Petitioner met the requisite criteria for justifying approval of its documented site plan for a proposed Gasoline Service Station Use to be used with the existing convenience store facility on the subject property.

For the foregoing reasons, the Zoning Board of Howard County, Maryland, on this 26 day of October, 2009, hereby DENIES the Petitioner's request for rezoning of the 1.31 acre subject property from the B-1 to the B-2 Zoning District.

ATTEST:

Robin Regner

Administrative Assistant

PREPARED BY:

HOWARD COUNTY OFFICE OF LAW

MARGARET ANN NOLAN COUNTY SOLICITOR

Paul T. Johnson

Deputy County Šolicitor

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